United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-2469

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REPLY BRIEF

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ADDENDUM TO APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHARLES BRADLEY GRIFFITH, on behalf of himself and all others similarly situated, Plaintiffs, v. RICHARD M. NIXON, individually and as President of the United States; Committee for the Re-election of the President; and the Finance Committee to Re-elect the President, Defendants.	Docket No. 74-2469 APPEAL from United States District Court District of Vermont

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INTRODUCTION

Is it possible for an answer to be more UNRESPONSIVE than that filed by appellees...? They offered no defense against appellants argument that "the Courts have jurisduction over trials to test a person's title to the Presidency, and Congress has jurisduction over trials to remove a person from the Presidency for misconduct" or any other argument made by appellant vis-a-vis a non-justiciable political question. In fact not a single solitary reference of any fashion was made to the political question section of appellant's brief. This total silence can only be construed as weakness, the avoidance of an argument they felt they could not win...and the coincident condemning of appellants arguments to a solitude stripped of the benefits of exposure and comparison. The answer that is offered is clearly no more than the broken wing act of a wood cock trying to draw the Courts attention away from appellant's arguments: the rudderless superficiality of answer's arguments demands that it not be otherwise.

I. NONJUSTICIABLE POLITICAL QUESTION

Inexplicably most of the issues argued under the above heading in the answer are irrelevant to that question and, in addition, are not encluded by either the appellant or the appellee in the statement of issues to be argued. This something old, something new, something borrowed, something blue wedding of issues springs from the same well of hope as the notion that if a monkey were to randomly type into infinity, he would eventually write all the great

classics. These extraneous issues have already been argued at the district court level in a memorandum which appellants shall place at the end of this reply brief as an addendum to the appendix. When these non-issues arise, this brief shall refer the court to arguments in the memorandum and then distinguish the citations.

Section I-A of Answer (Cause of Action)

See pages 5 - 22 of Addendum.

Answer cites Paynes v. Lee, 377 F.2d 61, 64 (1967) which is, if anything, supportive of appellants position for it states that the deprivation of the right to vote, vis-a-vis their case, is a cause of action under 42 U.S.C.A. 1985 (3)...and neither lists nor infers any instance contrary to the above. The other case cited, Pettengill v. Putnam County R-1 School District, 472 F. 2d 121 (8th Circ. 1973), is clearly distinguishable yet is also supportive of appellant's position.

> "In essence, the appellant's complaint asks the Federal Court to oversee the administration details of a local election. We find no constitutional basis for doing so in the absence of aggravating factors such as... unlawful conduct which interferes with the individual's right to vote." (emphasis added) Id. at 122

The citing of these two cases unequivocally reveal the barrenness of of any argument that appellees have to offer on this issue.

Section I-B of Answer (Common Law Right)

See pages 5 - 22 of Addendum.

The answer cites 20 C.J.S., Elections, section 246 for naught, for the Federal Courts have held that the Civil Rights Acts - title 42 U.S.C.A. section 1985 and others - vest the courts with the power to void an election and call a new one - e.g. Bell v. Southwell, 376 F. 2d 659 (1967). The general principle upon which this power relies is well stated in Bell v. Hood, 327 U.S. 678 (1945):

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Id. at 684.

The citing of City of Dallas v. Dallas Consolidated Electric St. Ry. Co., 105 Texas 337 (1912) by appellees should be a mystery to all. At issue was whether the Court could void the passage of an ordinance which plaintiffs contended was either unconstitutional or that the electorate had no power to adopt: is this the least distinguishable, most germane case available to support their argument?

For note on quo warranto see page 11 of appellant's brief.

Section I-C of Argument (Congress)

See pages 22 - 28 of Addendum.

Once again, the two cited cases are, if anything, supportive of Appellant's position. Burroughs vs. U.S.A., 290 U.S. 534, (1933), and Oregon vs. Mitchell, 400 U.S. 113 (1970) held, in contradiction of the claims of the states rightists, that Congress had legislative power to control the conduct of all National elections...but absolutely no mention was made of judicial power. In the parallel situation of the state election, the state legislatives have legislative power to control their elections, but this certainly, in itself, does not preempt the Courts judicial power to deal with elections. The true relevance of these two cases to the case at bar is that they refute any argument that the Federal Courts can't have jurisdiction over Presidential elections because electors are state officials.

Section I-D of Answer (Political Question)

See pages 22 - 28 of Addendum.

The two cases cited merely establish two areas in which a lawsuit may present the Court with a nonjusticiable politial question: (1) Acts of foreign nations Oetjen v. Central Leather Company, 246 U.S. 297 (1917), and (2) Acts of war Decosta v. Laird, 471 F. 2d 1146 (1973). Appellant readily excepts the fact that there are nonjusticiable political questions, but that is all these two cases manifest for their subject matter is totally distinguishable from the case at bar.

Section I-E of Answer (Standing)

See pages 34 - 35 of Addendum; cases distinguished on page 37 of Addendum.

Conclusion

Appellees claim that the case at bar presents a nonjusticiable political question because the impeachment clause - Article II, Section 4 of the Constitution - is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" Baker v. Carr, 369 U.S. 186, 217 (1962). Yet their answer does not contain a single argument or citation that can support their position - having read the answer, can the court recall one, just one argument that impressed them as being supportive of appellee's said contention. And most certainly the simple reinterative act of saying it's so, doesn't make it so. This failure to mount any argument or to refute appellant's argument leads inexorably to the conclusion that appellee's position is totally lacking in merit.

II. VENUE

Both parties to this appeal argee that - pursuant to Title 28 U.S.C.A. Section 1391 (c) - the residence of an unincorporated association has, for venue purposes, been expanded by the second circuit (and other circuits) to include "all the judical districts in which the unincorporated entity is doing business". Rutland Railway Corporation v. Brotherhood of Locomotive Engineers, 307 F. 2d 21, 29 (2ed Cir. 1962).

The answer of appellee, however, states - as though to declare the residence of the Defendant Committees moot - that "the venue statute, 28 U.S.C. Section 1391 (b) provides that the action may be brought only in the judicial district where all defendants reside. There is no allegation that defendant Richard M. Nixon resides in Vermont." (page 18)

Evidently, counsel for the defendants are not cognizant that the second circuit (and other courts) have expanded upon the literal reading of subsection 1391 (e) which provides that

> "A civil action in which each defendant is an officer of the United States...acting in his official capacity or under the color of legal authority...may...be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or...(4) the plaintiff resides...." (Emphasis added)

In a ruling written by Judge Friendly, for the Second Circuit, Liberation News Service v. Eastland, 426 F. 2d 1379 (1970) the Court held:

"We are in accord with decisions such as Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968), and Brotherhood of Locomotive Engineers v. Denver & R. G. R. R., 290 F. Supp. 612 (D. Colo. 1968)...which have held that the statutory requirement that "each defendant" be a Government official refers only to those defendants as to whom plantiffs seek to justify venue and personal jurisdiction under Section 1391 (e)." Id. at 1382, N.5.

The Powelton Case held:

"[T]he requirement that 'each defendant' be a federal defendant refers only to defendants who are beyond the forum's territorial limits. Thus the joining of a non-federal defendant located within the forum's territorial limits...has no effect upon the applicability or operation of Section 1391 (e). Indeed, any other conclusion would appear entirely illogical." Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Development, supra 284 F. Supp. 833-834.

Plaintiff's complaint was filed against defendant "Richard M. Nixon... as President of the United States": it therefore follows - pursuant to the Second Circuit's interpretation of subsection 1391 (e) - that venue will lie in Vermont if the residence of the non-federal defendants (the Defendant Committees) is, for venue purposes, Vermont or, to put it another way, if venue could have rested in Vermont if Richard Nixon had not been a defendant

in the case. Therefore, if the defendant committees were 'doing business' in Vermont, venue is properly laid in Vermont - pursuant to the Second Circuit's interpretation of subsection 1391 (c), (b) and (e).

To refute plaintiffs claim that Defendant Committees were doing business in Vermont, the answering brief relied solely upon the contention that "there are no allegations in the Plaintiff's complaint of offices, agents, or activities within the State and District of Vermont on the part of Defendants." (Emphasis added - page 17 & 18 of Answer) And, by inference since the answer ignored them, that all subsequent allegations have no weight in considering venue -- and, therefore, the Defendant Committees were not doing business in Vermont. This contention is clearly erroneous.

In the Rules for Civil Procedure, Form 2, Note 3, it states:

> "Pleading Venue. Since improper venue is an affirmative dilatory defense, it is not necessary for plaintiff to include allegations showing the venue to be proper."

Likewise, in Moore's Federal Practice it states:

> "Plaintiff is not required to include in his complaint an allegation showing proper venue" 1 Moore Par. 0.140 [1.-4] (2nd Ed-1974).
>
> "In as much as improper venue is a defense it is not necessary for the plaintiff...to include [in complaint] any allegation relative to venue" 2A Moore Par. 8.08 (2nd Ed-1974)

A sense of the scope of this rule is found in Ferraioli v. Cantor 259 F. Supp 842 (S.D.N.Y.-1966):

"The bareness of the amended complaint, however, is not decisive because allegations showing proper venue are not required in a complaint." Id. at 846.

"It is fair to say...that in all likelihood facts sufficient to sustain venue in this district do exist, although the affidavits do not show them. It also appears to me that the venue facts are within the knowledge of the defendant Denison, may not be known to the plaintiff, and are an appropriate subject for discovery. In such circumstances, dismissal of the complaint is not the proper remedy for imprecision of pleadings in light of the rule that venue facts do not have to be pleaded affirmatively. A more appropriate remedy, and the one which I am ordering here, is to deny defendant Denison's motion to dismiss the amended complaint for improper venue without prejudice and to grant the plaintiff leave to pursue discovery as to venue facts." Id. at 847.

It is clear therefore that if appellant can show the Court that the committee for the re-election of the president (hereinafter CREEP) and the Finance Committe to Re-elect the President (hereinafter Finance Committee) were "doing business" in Vermont, venue will be proper in Vermont.

a) Finance Committee filed with Vermont Secretary of State

It must first be understood that the two committees were two halfs of a whole. All the contributions collected and the money spent was the Finance Committee's money - e.g. they paid all the salaries of CREEP. This

has two ramifications for the question before us: (1) Only the Finance Committee under law had to file with the U.S. Government (GAO) and in states in which they were doing business (i.e. - making expenditures) because CREEP theoretically had no receipts or expenditures, and (2) because of their oneness, their failure to meet any test of separateness, it must be held that where CREEP is "doing business" so is the Finance Committee and vice versa. See e.g., ACS Ind. Inc. v. Keller Ind. Inc., 296 F. Supp. 1160 (D.C. Conn. 1969).

Enclosed at the end of this section on venue is a letter from the Vermont Secretary of State's office that says:

> "This certifies that the Finance Committee to Re-elect the President filed reports with the Office of the Secretary of State of Vermont during 1972 and 1973. These reports covered the period from April 7, 1972 (June 10 report) through August 31, 1973 (September 10 report)."

This is prima facie evidence of residence, for venue purposes, for the Finance Committee only had to file if they were "doing business" (i.e. making expenditures) in Vermont - Title 2 Section 439 (a). It also shows that, for venue purposes, CREEP was also doing business in Vermont.

b.) Set Up Affiliate Committees in Vermont

The Defendant Committees set up branch committees in Vermont: The Vermont Committee for the Re-election of the President and the Vermont Finance Committee to Re-elect the President. The Vermont Finance Committee was no more than a conduit for the parent Finance Committee and the Vermont

CREEP was the arm and agent of the parent defendant committees. If a subsidiary is merely a conduit or is not sufficiently separate from its parent, then its parent, for venue purposes, is doing business wherever the subsidiary is, ACS Ind. Inc. v. Keller Ind. Inc. Supra. Likewise, if a resident agent or representative is maintained in a state then they are doing business there, see e.g., Mutual Intern Export Co. v. Napco Industries, Inc. 316 F. 2d 393 (1963). It is clear that the existence of those two extensions of CREEP's power into Vermont means that the defendant committees were, for venue purposes, doing business in Vermont.

c.) Made Their Presence Felt In Vermont

In Marjorie Webster Jr. Col. v. Middle States Ass'n of C&S.S., 302 F. Supp. 459 (1969) it was held that:

> "the test of...venue is whether a corporation has made its presence felt in a particular area to advance its essential business purposes."

If the election of convention delegates supporting Nixon and the subsequent impressive victory of the Vermont electors supporting Nixon was at all ascribable to the Nixon election campaign, then it most certainly must be said that the defendant committees did make their presence felt in Vermont. And were thereby doing business in Vermont.

d.) Injecting Advertising, Mailings, Promotional Materials into State

The soliciation of business (votes & contibutions) by sending mail and promotional matierals into state, as most asuridly the Defendant Committees did in Vermont, is, for venue purposes, doing business. See e.g., School Dist. of Philadelphia v. Harper and Row Publishers, Inc., 267 F. Supp. 1006

The injecting of advertising into a state, as the defendant committees did with TV and print ads in Vermont, is, for venue purposes, doing business. See e.g. Scott Paper Co. v. Scott's Liquid Gold, Inc., 374 F. Supp. 184 (D.C. Del 1974).

e.) Conclusion

The filing with the Vermont Secretary of State; the existence of subsidiary conduit organizations in Vermont with their staff, office, and phone; the spending of monies and the receiving of contributions both directly and indirectly in and from Vermont; the injections of mailings, promotional materials, and TV and print ads; and the total impact upon Vermont voters of all the ubiquitous activities of the Defendant Committees...unequivically and incontrovertibly show that the Finance Committee and CREEP were doing business in Vermont for purposes of venue and are therefore residence for purposes of venue.

Venue therefore properly lies in Vermont!

Comment on venue vis-vis "in which the claim arose"

Plaintiff sympathizes with the opinion that "Interpreting the phrase 'in which the claim arose' is not without difficulty...." Ryan v. Glenn, 52 F.R.D. 185 at 192. Any argument on this point should, however, have been made moot by Judge Holden. He ruled that, if a named plaintiff (as opposed to an unnamed member of the plaintiff class in this class action) voted in Vermont in the 1972 Presidential election, then venue would rest in Vermont. This action has the names of hundreds of individuals who desire to be, and who are going to be joined to the complaint, many of whom voted in

Vermont. Since venue "should be treated on practical terms", Sperry Prods., Inc. v. Ass'n of Am. R.Rs., 132 F. 2d 408 (2ed Cir. 1942), it seems it would have been good Court procedure to inform plaintiffs of his impending ruling so that they could join named Vermont voters of 1972 to the complaint - if that is exactly what would most likely happen if he directly dismissed the case...but with the added delay and costs of refiling. If he wished venue to rest elsewhere, then he should have moved venue, pursuant to Title 28, Section 1404, to the mutually convenient S.D. Court of New York....

RICHARD C. THOMAS
SECRETARY OF STATE

ROBERT H. GIBSON
DEPUTY

STATE OF VERMONT
SECRETARY OF STATE
MONTPELIER

1 April, 1975

TO WHOM IT MAY CONCERN:

This certifies that the Finance Committee to Re-elect the President filed reports with the Office of the Secretary of State of Vermont during 1972 and 1973. These reports covered the period from April 7, 1972 (June 10 report) through August 31, 1973 (September 10 report).

Marlene B. Wallace

Marlene B. Wallace
Editor of State Papers

ADDENDUM TO APPENDIX

MEMORANDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CHARLES BRADLEY GRIFFITH, on behalf of himself and all others similarly situated, Plaintiffs, v. RICHARD M. NIXON, individually and as President of the United States; Committee for the Re-election of the President; and the Finance Committee to Re-elect the President, Defendants.	Civil Action 74-70 MEMORANDUM

MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

In the captioned action plaintiff Charles Bradley Griffith, on behalf of himself and all those similarly situated (all those "who suffered disadvantage to themselves" - i.e., "all the registered voters of 1972 who were in opposition to President Nixon and his Administration or would have been if the truth, vis-a-vis Nixon et al, had not been unlawfully kept from them and/or if a more acceptable candidate had not been unlawfully manipulated out of the Democratic...nomination." Complaint par. #5 & #170, respectively) seeks a determination that defendants (& "agents who acted for defendants or were under defendants' direction and control," par. #11) did cause to be deprived, did conspire to deprive, and did deprive plaintiffs of their right and privilege to "Free Elections" (specifically "the right, when elections are held, to have said elections free from control - i.e., free from any manner or form of manipulation

that would debase, dilute, diminish, or deny the vote of any segment of the American puplic that has been given the right to vote," par. #165), their right to vote, their right to know, and their right to equal protection of the law by corrupting and manipulating the nominational-electoral process through the commission of massive and pervasive "Informational Irregularities"

(INFORMATIONAL IRREGULARITIES

"A. SUPPRESSION...of information
(a) Cover-ups
(b) Inaccessibility

B. REPRESSION...of information sources
(a) Sabotage
(b) Intimidation
(c) Censorship

C. ESPIONAGE...to acquire information
(a) Burgling
(b) Bugging
(c) Surveillance

D. EXTORTION...of monies to propagate information
(a) Fear-vending
(b) Favor-vending
(c) Blackmail

E. FABRICATION...of misinformation
(a) Counterfeiture
(b) Entrapment
(c) Prosecution," par. #20)

which were determinative - i.e., if the electorate on election day had had knowledge of all the embarrassing information being unlawfully covered up (directly or indirectly) and of all the unlawful cover-up activies themselves, they would have voted quite differently, very possibly reversing the outcome of the election; and if the fragile images of the candidates for the Democratic nomination had not been unlawfully manipulated, the Democratic nominee could quite possibly have been someone other than George McGovern (see par. #156) - in violation of Constitutional and Statutory (Title 42, Section 1985) guarantees; that the Presidential election and nominations are therefore null and void; and that new elections and primaries be held, and damages paid.

This memorandum (and motion) is in reply to attacks on standing, jurisdiction, justiciability, venue, and service and to U.S. Attorney Cook's request to appear as amicus curiae in the instant action.

I. PROLOGUE

"DO JUSTICE!" entreated Learned Hand of the Court....

What precedents there are, clearly favor the plaintiffs' positions: equally important, however, is the unfettered logic of sovereign necessity - the self-evident existence of a right or remedy because its nonexistence would be contradictory to the survival of Democracy.

It is self-evident that:

(a) THIS NATION MUST HAVE THE CAPABILITY TO VOID A PRESIDENTIAL ELECTION THAT IS CONTROLLED AND PERVADED BY CORRUPTION AND FRAUD: otherwise Democracy would be defenseless against any power or ideological group willing to break the law and chance fines and prison to elect a President who would give them control of the government (Executive Branch). Alexander Hamilton, when speaking in the Federalist Papers (59) of Federal intervention in National elections, said "every government ought to contain in itself the means of its own preservation." The question is not, therefore, whether or not a Presidential election is voidable, but rather the degree of corruption necessary to void an election and the degree of corruption present in the election being challenged.

(b) THE FEDERAL COURTS IS THE BRANCH OF GOVERNMENT WITH THIS CAPABILITY:

CONGRESS: It only certifies the "certificate of electoral vote" for each state and counts said vote. Impeachment fails because 1.)it does not replace the President with one selected by the people, 2.)it is hopelessly cumbersome, 3.)it is at the mercy of the partisan will of Congress, and 4.)it is inoperative if Congress cannot prove the President's culpability even

though they can prove the election, itself, is fraudulent.

EXECUTIVE: It clearly cannot be relied on to pass judgement upon itself.

STATES: They are incapable of dealing with interstate corruption and fraud in a National election.

FEDERAL COURTS: They have experience adjudicating corrupted elections and, by default, the responsibility of voiding an election falls on them.

(c) THOSE PEOPLE WHO SUFFERED DISADVANTAGE TO THEMSELVES IN THE DEBASEMENT OF THEIR VOTE MUST BE ALLOWED TO BRING SUIT, as were the disadvantaged voters in the reapportionment cases, because there is no one else to bring suit (the Justice Department refused) except a few defeated candidates who for various reasons can easily be turned aside and whose stake in American Democracy is no greater than the injured voter's...for a democracy is a government "of the people, by the people, and for the people."

Therefore, by the logic of sovereign necessity, it is clear that the Federal Courts must have the power to void a corrupt Presidential election when a disadvantaged injured voter brings suit. If the Courts say otherwise, they will be setting a precedent that belies the efforts of our Founding Fathers who, in framing the Constitution, "sought to design a political system which would make it unnecessary for Americans to ever again exercise the right of revolution they had claimed in the Declaration of Independence" - Justice W.J. Brennan, An Affair With Freedom, p.279. And through that judicial act America would cease being a nation whose Constitution guarantees the right to free and open elections and the right to an effective, meaningful, undebased vote - for there is no right if one has no redress.

Unless the Courts wish to unmake America and tell the people that, contrary to what they have been led to believe, they do not have an inalienable right to "Free Elections", it is self-evident that a suit such as Plaintiffs' cannot be dismissed for lack of standing, jurisdiction, justiciability but

rather must be decided on its merits -- i.e., whether or not the corruption went beyond that which should be tolerated in a Presidential election.

This suit is not against President Nixon but rather for free elections and the right to vote, to know, and to equal protection of the law. It does not wish to harass President Nixon, but rather to give this nation relief from the divisiveness and acrimony of "Watergate", the approaching impeachment, and the subsequent conviction or acquital. It will, however, inexorably and inescapably challenge the courts courage, independence, and desire to "DO JUSTICE".

II. COMPLAINT STATES A CAUSE OF ACTION

A. THE NIXON ADMINISTRATION RE-ELECTION CAMPAIGN VIOLATED WELL-ESTABLISHED CONSTITUTIONAL AND STATUTORY RIGHTS

1. The Right to Cast a Meaningful, Effective, intelligent, informed, undebased vote

Almost 80 years ago, the United States Supreme Court declared, "Among the rights and privileges which have been recognized by this court to be secured to citizens of the United States by the Constitution [is]...the right to vote for Presidential electors." In re Quarles, 158 U.S. 532 (1895), citing Ex parte Yarbrough, 110 U.S. 651 (1884); see Hardyman v. Collins, 80 F. Supp. 501, 504-05 & n.5 (S.D.Cal. 1948), aff'd, 341 U.S. 651 (1951). Whether the Constitution independently creates the right to vote for Presidential electors is open to doubt, since Article II, Section 1 simply provides, "Each state shall appoint, in such manner as the legislature thereof may direct, a Number of Electors," and at one time electors in some states were selected by legislative appointment. But the question is academic because for more than a century all the states have provided for popular elections of the electors. And the states having unanimously chosen "that mode of

selection," there can be no doubt that the Constitution protects the right to vote for presidential electors. See, e.g., United States v. Original Knights of the Ku Klux Klan, 250 F.Supp. 330, 354 (E.D.La. 1965) (three-judge court).

Thus, in striking down restrictions on the appearance of third-party candidates on presidential primary election ballots, the Supreme Court recently referred to "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," and declared:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Williams v. Rhodes, 393 U.S. 23, 30, 31 (1969), quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

Even more recently two Supreme Court justices concluded -- in a separate opinion not challenged on this point -- that the right to vote in presidential elections "is secured by the Federal Constitution." O'Brien v. Brown, 409 U.S. 1, 15 (1972) (Marshall, J., joined by Douglas, J., dissenting from granting stays of lower court decisions). They inferred the constitutional status of the right to vote from the well-established constitutional power of Congress to regulate presidential elections and from "the very concept of a supreme national government with national officers." 409 U.S. at 15, citing Oregon v. Mitchell, 400 U.S. 112, 124 & n.7(1970) (opinion of Black, J.); Burroughs v. United States, 290 U.S. 534 (1934). Moreover, the right to vote for presidential electors enjoys a statutory basis, for Congress, pursuant to its powers of regulation, has enacted a series of laws -- violations of which the complaint alleges -- to protect against "flagrant

and irreparable erosion of the right to an effective vote" in presidential and congressional elections. See, e.g., Common Cause v. Democratic National Committee, 333 F.Supp. 803, 814 (D.D.C. 1971).

The constitutional and statutory guarantees prevent not only outright denial of the right to vote, but also "infringement" of "the right to cast a ballot effectively." See, e.g., Duncantell v. City of Houston, 333 F.Supp. 973, 975 (S.D.Tex. 1971); Williams v. Rhodes, supra, 393 U.S. at 30; Common Cause v. Democratic National Committee, supra, 333 F.Supp at 814.

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Moore v. Ogilvie, 394 U.S. 814, 818 (1969), quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964).

2. The Right to a Fair, Free and Open Presidential Election.

Since Article I, Section 2 specifically provides for selection of presidential electors and since all the states have directed popular election of those electors, the Constitution surely envisions a fair, free and open presidential election. As the Supreme Court declared 90 years ago, it is "the necessity of government itself that the votes by which its members of Congress and its President are elected shall be the free votes of the electors and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice," for ours is "a government whose essential character is republican, whose executive head and legislative body are both elective." Ex parte Yarbrough, supra, 110 U.S. at 662 ; Burroughs

v. United States, supra, 290 U.S. at 546. Again, this right has a statutory basis, for Congress has enacted laws -- violations of which occurred in the 1972 campaign -- "to preserve the purity of presidential and vice-presidential elections." See Burroughs v. United States, supra, 290 U.S. at 544; Common Cause v. Democratic National Committee, supra; cf. United States v. Original Knights of the Ku Klux Klan, supra, 250 F. Supp.at 354.

3. The Right to Receive Ideas and Information About Election Issues Free From Governmental Disruption and Deception.

The Supreme Court repeatedly has pointed to "the central commitment" of the first amendment to the protection and encouragement of "debate on public issues," e.g., Bond v. Floyd, 385 U.S. 116, 136 (1966), and of "[c]riticism of government." E.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964). That central purpose is derived from the Madisonian principle that "the censorial power is in the people over the Government, and not in the Government over the people." E.g., New York Times Co. v. Sullivan, supra, 376 U.S. at 282. Thus "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." E.g., Stromberg v. California, 283 U.S. 359, 369 (1931). "Speech concerning public affairs," then, "is more than self-expression; it is the essence of self-government." E.g., Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

These first amendment guarantees protect not only the rights of those who engage in public criticism but also the rights "of all of us." See, e.g., Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). They protect "the paramount public interest in a free flow of information to the people

concerning public officials, their servants," e.g., Garrison v. Louisiana, supra, 379 U.S. at 77 (emphasis supplied), and "freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." E.g., Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (emphasis supplied). Thus the first amendment "necessarily protects" the right "to receive information and ideas" as "fundamental to our free society." E.g., Stanley v. Georgia, 394 U.S. 557, 564 (1969).

These public rights assume particular importance in an election campaign. "Competition in ideas and governmental policies is at the core of our electoral process." E.g., Williams v. Rhodes, supra, 393 U.S. at 32. Not only is the Government prohibited from disrupting the free flow of ideas and information, but also it "may not mislead . . . voters to the effect that they do not know what they are voting for or against." See Kohler v. Tugwell, 292 F.Supp. 978, 982, 985 (E.D.La. 1968) (majority and concurring opinions), aff'd per curiam, 393 U.S. 531 (1969).

4. The Nixon Administration Violated these Rights in a Discriminatory and Arbitrary Manner Depriving Those Opposed to Nixon's Re-Election of Equal Protection of the Laws and Equal Privileges and Immunities Under the Law.

The Nixon Administration's continual suppression of public dissent and opposition and its repeated concealment and distortion of information relevant to the major election issues violated all these rights in a rather obvious manner. Both types of conduct disrupted and distorted the free flow of information and ideas unfavorable to Nixon to the public and prevented or at least deterred the effective organization of public opposi-

tion to Nixon. Such disruption and distortion of the entire electoral and political process, in turn, prevented the citizenry from casting meaningful, effective, informed and intelligent votes and destroyed the fair, free and open election to which the public was entitled.

More subtly, but equally effectively, the Nixon Administration's campaign financing also violated these rights. As the Supreme Court has declared, "the free use of money in elections . . . presents equal cause for anxiety" as "lawless violence,"and "if the very sources of power may be

> poisoned by corruption or controlled by violence and outrage, without legal restraint -- then,indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force on the one hand, and unprincipled corruptionists on the other." Ex parteYarbrough, supra, 110 U.S. at 667; Burroughs v. United States, supra, 290 U.S. at 547.

The campaign financing laws the Nixon Administration violated were specifically enacted to prevent the "undue influence" of wealth from distorting the electoral process and the resulting "erosion of the right to an effective vote" of those who do not share great economic power. See, e.g., Common Cause v. Democratic National Committee, supra, 333 F.Supp. at 813, 814.

That case observed that the influence of wealth in the form of unrestricted campaign contributions might become so overwhelming "as to undermine and perhaps even nullify [the] . . . right to vote" of the average citizen. 333 F.Supp. at 812. And it quoted a 1940 Congressional speech by Senator Bankhead which admirably illustrates the interrelationship between campaign financial violations and the rights at issue here:

> "We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose of paying the expenses of campaigners sent out in to the country to spread propaganda, both true and untrue." 333 F.Supp. at 813 n.32.

The Nixon Administration used its ill-gained loot for all those purposes and to finance its unlawful espionage operation directed at its political foes.

The Nixon Administration's re-election campaign had a peculiar impact on the constitutional and statutory rights of those who opposed Nixon's re-election. If one common thread ran through the entire campaign, it was invidious political discrimination. Governmental favoritism and benefits were unlawfully extended to the Administration's friends and denied to its foes. Justified legal investigations and proceedings against Nixon's supporters were dropped or never initiated, and unjustified and illegal measures were pursued to the hilt against his opponents. Nixon Administration officials immediately disclosed information favorable to Nixon to the public, and they concealed or lied about information unfavorable to him. These discriminatory practices, touching the fundamental electoral and political rights and interests of Nixon's opponents in an invidious and

totally unjustified manner, deprived them of the rights to equal protection of the laws and to privileges and immunities under the law. See, e.g., Williams v. Rhodes, supra, 393 U.S. at 30-31.

B. CORRUPT PRESIDENTIAL ELECTION AS CAUSE OF ACTION

The rights the Nixon Administration violated, inextricably linked to each other, are all part of the fundamental constitutional scheme guaranteeing a republican form of government, see, e.g., Burroughs v. United States, supra, 290 U.S. at 546, and democratic self-government through the electoral and political process. See, e.g., Garrison v. Louisana, supra, 379 U.S. at 77, New York Times Co. v. Sullivan, supra, 376 U.S. at 282. "[T]he distinguishing feature of [the republican]...form[of government] is the right of the people to choose their own officers...." See Baker v. Carr, 369 U.S. 186, 222 n.48 (1962), quoting In re Duncan, 139 U.S. 449, 461 (1887). "Free and honest elections are the very foundation of our republican form of government," and "every citizen has an inalienable right to full and effective participation in the political process." See Reynolds v. Sims, 377 U.S. 533, 564 n.41, 565 (1964). If, as the complaint demonstrates, violations of electoral and political rights so pervasively undermined the integrity of the election that it departed from that Constitutional scheme, it is legally invalid, and its results should be set aside.

The federal and state courts have held that they have unprecedented broad powers to grant declaratory and injunctive relief to prevent irregularities which affect the integrity of elections, for "[t]he aim of equity is to adept judicial power to the needs of the situation" and "relief in matters of public, rather than private, interest may be quite different from that ordinarily granted." See, e.g., Alabama v.United States, 304 F. 2d 583, 591 (5th Cir. 1962), aff'd, 371 U.S. 37 (1962). "This interference with nationally guaranteed rights, whether by public officials or private

persons, corrupts the purity of the political process on which the existence and health of the National Government depend," and "[t]he Nation has a responsibility to supply a meaningful remedy for a right it creates or guarantees." E.g., United States v. Original Knights of the Ku Klux Klan, supra, 250 F.Supp. at 350, 355. Thus the federal courts have granted broad injunctive and declaratory relief to prevent campaign abuses even in the absence of statutes specifically authorizing such remedies. See, e.g., Common Cause v. Democratic National Committee, supra, 333 F.Supp. at 814 (declaratory relief to prevent violations of campaign financing laws which constitute "a flagrant and irreparable erosion of the right to an effective vote"); Rising v. Brown, 313 F.Supp. 824 (C.D.Cal. 1970) (injunction to restrain federal candidates from violating congressional franking privileges); Straus v. Gilbert, 293 F.Supp. 214 (S.D.N.Y. 1968) (same).

Because the pervasive and serious nature of the 1972 campaign abuses was deliberately concealed from public view prior to the election -- and, indeed, became known at all only because of singularly fortuitous circumstances, see Nixon v. Sirica, 487 F. 2d 700, 705, 722 n. 101 (D.C.Cir. 1973) (en banc) -- "[t]here was really no effective relief available before the election." See, e.g., Bell v. Southwell, 376 F. 2d 659, 664 (5th Cir. 1967). For "[i]t would have been exceedingly difficult for counsel to have had sufficient facts in hand prior to the election to warrant signature of counsel certifying, under Rule 11 [of the Federal Rules of Civil Procedure]... that there was good ground to support claims made in the complaint." See Toney v. White, 488 F.2d 310, 314 (5th Cir. 1973) (en banc). In these circumstances, and provided the campaign illegalities are sufficiently pervasive and substantial to cast doubt on the fairness of the election, judicial invalidation of its results is required.

The courts have repeatedly set aside state and local elections

thoroughly infected by constitutional violations casting doubt on the fairness of the process and undermining the right to an effective vote even though it was not possible to determine with any precision whether a different result would have otherwise been obtained and, indeed, even when it was clear that the result would have been the same. The reasoning of those cases is compelling here.

In Bell v. Southwell, supra, 376 F. 2d at 662, 664 (5th Cir. 1967), the court set aside a local election conducted with racially segregated voting lists and polling booths and ordered a special election, declaring that in the face of "gross, unsophisticated, significant, and obvious racial discriminations," an inability to demonstrate that the outcome would have been different does not "justify denial of effective, present relief." Indeed, in that case, "it was likely that the result would have been the same notwithstanding the discrimination." Toney v. White, supra, 488 F. 2d at 313. The Bell court reasoned "that there are certain discriminatory practices which, apart from demonstrated injury or the inability to do so, so infect the processes of the law as to be stricken down as invalid," that "in areas of such vital importance, state-imposed racial discrimination cannot be tolerated and to eliminate the practice or the temptation toward it, the law must extinguish the judgment wrought by such a procedure." 376 F. 2d at 662, 663. Noting that "it is not Negroes alone who suffer, it is the body politic as a whole, both Negro and white," the court declared:

> "The [District] Court's fundamental mistake was in assuming that this was an election contest as such in which the winner is challenged because of ineligibility, fraud or irregularities in the conduct of the election, the receipt or counting of illegal ballots which would change the result and the like,

> and which, as a separate special [state] statutory proceeding, must be timely filed by specified persons following statutory procedures and in particular tribunals. Mrs. Bell and her co-plaintiff alone or as members of the class [of black persons and other voters] did not challenge the eligibility of Mr. Southwell or the fact that he received an overwhelming majority. Indeed, Mrs. Bell as a former candidate did not seek to be selected over Southwell or any other opponent. What, and all, she and others sought was an election conducted free of such indefensible, racial distinctions. That being so, it was not the usual simple case of counting votes and denying relief for want of affirmative proof of a different result." 376 F. 2d at 662, 664-65.

Bell thus stands for the rule that an election must be set aside as null and void if racial discrimination results in "serious violations of voting rights." See Toney v. White, supra, 488 F. 2d at 313; Smith v. Paris, 386 F.2d 979 (5th Cir. 1967); United States v. Democratic Executive Committee, 288 F. Supp. 943 (M.D.Ala. 1968); compare, e.g., Hamer v. Ely, 410 F.2d 152 (5th Cir. 1969).

In Toney v. White, supra, 488 F.2d at 312, the court set aside a local primary election in which a voting registrar had purged "the voter rolls in a manner directed at black voters but not at white voters." Accepting for purposes of its decision the lower court's finding that the discrimination was not "gross, spectacular [and] completely indefensible" and was not prompted by "racial motive," the appellate court voided the election in any event because the "racial discrimination . . . might have affected the election results" and was "of such a substantial nature as possibly to have affected

the outcome of the election." 488 F.2d at 312, 314, 315. Local elections were also voided and new elections ordered in Hadnott v. Amos, 394 U.S. 358 (1969), which involved discriminatory application of a state corrupt practices act and of a state elections statute not cleared under the Voting Rights Act of 1965, 42 U.S.C. Section 1973(c), to bar black candidates from the ballot, and in Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966), cert. denied, 385 U.S. 851 (1966), which involved the barring of black voters from voting and running as candidates by virtue of past discrimination. early registration cut-off dates and poll tax requirements, even though there was "no finding in either case of an intent to discriminate or of gross or spectacular discrimination," because "the discrimination could have affected the results of the elections." Toney v. White, supra, 488 F.2d at 313; see, e.g., Brown v. Post, 279 F. Supp. 60 (W.D.La. 1968) (new election ordered under fifteenth amendment and Voting Rights Act of 1965 because of discrimination in making absentee voting more convenient for whites than blacks, though no bad faith and result of election would not have been changed); United States v. Post, 297 F. Supp. 4((W.D.La. 1968) (new election ordered under fifteenth amendment and Voting Rights Act because black voters not told that, as result of last-minute procedural change, straight-ticket voting would not register a vote for black candidate, though omission was in good faith); cf. Perkins v. Matthews, 400 U.S. 379 (1971) (remanding to district court to determine whether failure to obtain approval under Voting Rights Act for change from district to at-large election of local officials required new election in light of nature of change but instructing it to disregard whether they had a discriminatory purpose); compare, e.g., Perkins v. Matthews, 336 F. Supp. 6 (S.D.Miss. 1971).

Repeatedly, too, the courts have voided state and local elections conducted under apportionment schemes violating the equal protection clause because of dilution of the right to an effective vote and regardless of the

good faith of the state officials or whether the election results would have otherwise been different, for the state "must yield" if necessary "to prevent an infringement of someone's Fourteenth Amendment rights." See, e.g., Taylor v. Monroe County Board of Supervisors, 421 F. 2d 1038 (5th Cir. 1970), citing Reynolds v. Sims, supra, and Allen v. State Board of Elections, 393 U.S. 544 (1967); Swann v. Adams, 263 F. Supp. 225 (S.D.Fla. 1967) (three-judge court), on remand from Swann v. Adams, 385 U.S. 440 (1967); Reynolds v. State Elections Board, 233 F. Supp. 323 (W.D.Okla. 1964); cf., e.g., Parsons v. Buckley, 379 U.S. 359 (1965) (shortening terms of state legislatures elected under invalid apportionment); Schaefer v. Thomson, 251 F. Supp. 450 (D.Wyo. 1965) (three-judge court), aff'd sub nom. Harrison v. Schaefer, 383 U.S. 269 (1966) (same); Keller v. Gilliam, 454 F.2d 55 (5th Cir. 1972).

Moreover, "[a]t common law the results of elections to public office have sometimes been avoided . . . because of other wrongful conduct so extensive as to leave the free and unfettered preference of the voters in doubt," including not only "destruction of ballots" to an undetermined extent, but also "coercion or undue influence" and "solicitation of votes by bribery." See generally Note, Avoidance of an Election or Referendum When the Electorate Has Been Misled, 70 Harv.L.Rev. 1077 (1957) & cases there cited. Thus, for example, in Ury v. Santee, 303 F. Supp. 119 (N.D.Ill. 1969), the court set aside a local election and ordered a new one where long lines at some newly consolidated precincts prevented some persons from voting. It found that "[a]s a consequence of the failure of defendants to provide adequate voting facilities, plaintiffs . . . were hindered, delayed and effectively deprived of their rights secured by the Constitution of the United States to vote in the . . . election. 303 F. Supp. at 126. And, though it could make no determination that the election results would otherwise have been different, it concluded that "[t]he injury suffered by

plaintiffs and other citizens similarly situated in permitting persons not validly elected to assume control of the Village of Wilmette would far outweigh the cost of conducting a fair, proper and valid election." 303 F. Supp at 127; cf. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (holding bond issue passed in election invalid because of state provisions denying vote to non-property-owning but otherwise qualified voters).

Here, too, the plaintiffs claim not so much that particular candidates are entitled to the Presidency and Vice-Presidency of the United States or that the election results would have been different but for the campaign abuses, but that they and the rest of the American public were deprived of their right to an election and to vote free from the pervasive illegalities violating fundamental constitutional rights and infecting the entire political process surrounding that election. Nor is this case, then, a matter of counting votes. It is, rather, a matter of fundamental fairness going to the very roots of the constitutional scheme of government. And the 1972 election must be declared legally null and void because those illegalities cast substantial doubt on the fairness of the electoral process. Morover, it is certainly possible that those illegalities might have or could have determined the results of the election.

The defendants will argue, of course, that the campaign illegalities involved here were much farther removed from the actual voting process than such illegalitites as destruction of ballots and ballot-stuffing, as discriminatory application of rules or practices regarding absentee voting, place of voting and registration of voters and candidates and as rules or practices which actually prevent some persons from voting. The short answer is that it is obvious [illegible] campaign abuses of the sort presented here -- especially in view of the unsurpassed powers of their

perpetrators, the nation's highest governmental officials -- much more effectively undermine fair, free and open elections with much less effort and at much less cost. And, as we have seen, elections have been set aside because of racial discrimination and apportionment abuses not only where such practices resulted in outright deprivation of the opportunity to vote but also where they resulted in the deprival of the right to an effective and meaningful vote. Moreover, the Supreme Court has yet to elevate deprivations of the equal protection rights -- whether accomplished by racial discrimination or reapportionment -- over violations of other Bill of Rights guarantees. See, e.g., Williams v. Rhodes, supra. Putting aside the fact that the conduct alleged here also violated the right to equal protection of the laws, the Court has consistently declared, as we have seen, that the other rights denigrated here are the most fundamental, central and precious of all.

The cases demonstrate that the determination of whether an election is invalid must be made on the basis of a functional test of its fairness, which takes into account all the circumstances, and not artificial and sterile standards which disproportionately elevate any one fact, such as remoteness from the actual voting process. See, e.g., Perkins v. Matthews, supra. "For purposes of accomplishing the constitutional objective, the electoral process is indivisible," and "[t]he act of casting a ballot in a voting booth cannot be cut away from the rest of the process." E.g., United States v. Original Knights of the Ku Klux Klan, supra, 250 F. Supp. at 352, quoting United States v. Manning, 215 F. Supp. 272, 283 (W.D.La. 1963); cf. United States v. Classic, 313 U.S. 299, 308, 318 (1941). As the Ku Klux Klan court held:

> "Burroughs [v. United States, supra] is one of a number of cases dealing with corrupt election practices which go

> far beyond the act of voting in an election. The Federal corrupt practices laws operate on the campaigning stage rather than the voting stage and apply to private persons having no part in the election machinery." 250 F. Supp. at 354; cf. Smiley v. Holm, 285 U.S. 355, 366 (1932).

Hence -- reasoning that "[t]here is an obvious parallel between corruption of the federal election process by the use of money and corruption of the same process by acts of violence and intimidation that prevent voters from getting on the registration rolls or, indeed, from ever reaching the registration rolls" -- it concluded that "acts of economic coercion, intimidation and violence directed at Negro citizens . . . for the purpose of deterring their registration to vote strike at the integrity of the federal political process." 250 F. Supp. at 354, 355 (emphasis deleted); see, e.g., Ex parte Yarbrough, supra; United States v. Wood, 295 F.2d 772 (5th Cir. 1961), cert. denied, 369 U.S. 850 (1962) (enjoining as interference with voting and electoral rights protected by the Civil Rights Act of 1957 by groundless state prosecution of a black organizer who had set up a registration school in a county where no black persons had ever registered to vote); Paynes v. Lee, 377 F.2d 61, 64 (5th Cir. 1967) (declaring that "[t]he right to be free from threatened harm and the right to be protected from violence for an attempted exercise of a voting right are no less protected than the right to cast a ballot on the day of election").

Since "the Federal voiding of a State election" is "[d]rastic if not staggering" and "a form of relief to be guardedly exercised," see, e.g., Bell v. Southwell, supra, 376 F.2d at 662, the defendants will also undoubtedly argue that it is one thing to void state and local elections and quite another to invalidate a presidential and vice-presidential election. Admittedly, the plaintiffs would be less than frank if they did not admit

that the governmental disruption resulting from granting the relief requested here will be incomparably greater than that presented by the cases setting aside state and local elections. But the very importance of the Presidency provides all the more reason for ensuring that the election filling that office is fair and free. In upholding laws designed to protect the integrity of presidential elections, the Supreme Court declared, "The importance of [the President's] . . . election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." Burroughs v. United States, supra, 290 U.S. at 545.

Very emphatically, then, the importance of the Presidency ought not to render the election immune from judicial scrutiny. "We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority." The Floyd Acceptance, 74 U.S. 666, 676-77 (1868). The courts have thus recognized "the necessity for a judicial check upon the unconstitutional assertion of power by the President, even if that check may in the short run adversely affect the public interest, in order to avoid even an initial step toward tyranny." National Treasury Employees Unions v. Nixon, No. 72-1929, slip opinion at 44 (D.C.Cir. January 25, 1974), citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94, 596, 613 (1952) (opinion of Frankfurter, J.). The courts should "hesitate to set a precedent, in contravention of basic constitutional principles, that might permit or encourage some future high executive officer to become a despot." In re Nixon, 360 F. Supp. 1, 5 n.6 (D.D.C. 1973), aff'd sub nom. Nixon v. Sirica, 487 F.2d 700, 711 n. 49 (D.C.Cir. 1973) (en banc).

> "The foundation of our form of government is the consent of the governed. Whenever any person interferes with the right of any other person to

vote or to vote as he may choose, he acts like a political termite to destroy a part of that foundation. A single termite or many termites may pass unnoticed, but each damages the foundation, and if that process is allowed to continue the whole structure may crumble and fall even before the occupants become aware of their peril. Eradication of political termites, or at least checking their activities, is necessary to prevent irreparable damage to our Government." United States v. Wood, supra at

In 1972 waves of political termites, backed by the power of the highest offices in the land and taking the entire country unaware, went a long way toward destroying the very constitutional foundation on which our government rests. If, as the courts have held, they have the power to check even slight steps toward presidential tyranny, they surely have the duty to declare null and void a presidential election which violated this country's central commitment to a republican form of government. It is not yet too late to prevent irreparable damage to our government.

III. COMPLAINT DOES NOT PRESENT A POLITICAL QUESTION

"[T]he mere fact that the suit seeks protection of a political right does not mean it presents a political question," for "[s]uch an objection 'is little more than a play upon words.'" Baker v. Carr, 369 U.S. 186, 209 (1962), quoting Nixon v. Herndon, 273 U.S. 536, 540 (1927) Common Cause v. Democratic National Committee, 333 F. Supp. 803, 814 (D.D.C. 1971). As the Court there declared:

"The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts

cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases . . . show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." 369 U.S. at 217.

Rather, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers," for "it is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question.'" Baker v. Carr, supra 369 U.S. at 210. There, after an exhaustive review of the cases, the Court concluded:

> "Prominent on the surface of any case held to involve a political question is found a totally demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217; Powell v. McCormack, 395 U.S. 486, 517-19 (1969);

National Treasury Employees Union v. Nixon, No. 72-1929, slip opinion at 30-31 (D.C.Cir. January 25, 1974).

A discriminating inquiry into the precise facts and posture of the suit to set aside the results of the 1972 presidential election clearly demonstrates that none of these "formulations of a political question [are] 'inextricable from the case at bar,'" and thus that the "claim is not barred by the political question doctrine." See, e.g., Powell v. McCormack, supra, 395 U.S. at 549; Baker v. Carr, supra, 369 U.S. at 210, 217, 226; National Treasury Employees Union v. Nixon, supra, slip opinion at 31-35.

A. The Suit Alleges Massive Violations of Constitutional and Statutory Rights Traditionally Subject to Judicial Redress and Seeks Relief the Courts Have Granted in Other Cases.

"In deciding generally whether a claim is justiciable, a court must determine whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." Powell v. McCormack, supra, 395 U.S. at 517; Baker v. Carr, supra, 369 U.S. at 198.

The complaint alleges, as we have seen, that pervasive governmental misconduct violated various constitutional and statutory provisions safeguarding the public's electoral and political rights. To this extent, "[t]here are not lacking judicially discoverable standards for resolving the dispute in this case," for "[t]he interpretation of federal statutes [and constitutional provisions] makes up a large part of the day-to-day work of the federal judiciary and the standards used in making those interpretations are well developed and familiar." See, e.g., National Treasury Employees Union v. Nixon, supra, slip opinion at 33; Powell v. McCormack, supra, 395 U.S. at 549 (1969); Baker v. Carr, supra, at 226.

Indeed, as we have seen, all the rights alleged have been the subject of repeated litigation, and their contours are well-defined.

Moreover, the federal courts have repeatedly made determinations and granted relief of the sort requested here, the invalidation of an election so permeated by constitutional deprivations that its fairness is suspect. The courts have even indicated that judicially identifiable criteria are available to identify whether a given government departs from the republican form. See Baker v. Carr, supra, 369 U.S. at 222 n.48, & cases there cited. Certainly, they are capable of making that determination with respect to an election. See Kohler v. Tugwell, supra, 292 F. Supp. at 984-85 (concurring opinion of two judges on three-judge court). Hence, "there can be no doubt that the duty asserted can be judicially identified and its breach judicially determined." See, e.g., Common Cause v. Democratic National Committee, supra, 333 F. Supp. at 814.

B. The Power to Set Aside a Presidential Election is Not Committed to Congress.

The Constitution does not, of course, specifically confer the power to invalidate elections on any branch of government. It undoubtedly confers on the Congress the sole power of impeaching the President. But that hardly constitutes a textually demonstrable constitutional commitment to it of the issue of the validity of a presidential election. Compare, e.g., Powell v. McCormack, supra; National Treasury Employees Union v. Nixon, supra, slip opinion at 31-33.

The courts have repeatedly rejected the proposition that the impeachment clause is the sole or even an adequate remedy for presidential abuses of power, largely because it is a tedious process hinging on political as well as legal considerations and because its invocation rests in the unfettered discretion of Congress. See, e.g., In re Nixon, supra, 360 F. Supp.

at 5 n.9; Nixon v. Sirica, supra, at 711-12; National Treasury Employees Union v. Nixon, supra, slip opinion at 54-55. Only "as far as his powers are derived from the Constitution," is the President "beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power." Kendall v. United States, 37 U.S. 524, 610 (1838).

Moreover, impeachment and subsequent conviction require a showing of the President's culpability in bribery, treason, high crimes or misdemeanors, but if a presidential election is constitutionally invalid, it must be set aside whether or not the candidate participated in or knew of the illegalities rendering it void. As we have seen, the federal courts have set aside elections infected by malaportionment and racial discrimination regardless of the good faith of election officials and candidates. Hence the wrongs which may invalidate an election simply do not coincide with the corrective measure of the impeachment power.

C. The Case Does Not Otherwise Present a Political Question.

That "[t]he resolution of this case does not require initial policy determination of a kind clearly for non-judicial discretion," see, e.g., National Treasury Employees Union v. Nixon, supra, slip opinion at 33, is also demonstrated by those cases in which federal courts have set aside elections. Nor does this case pose an unusual need for unquestioning adherence to a political decision already made "by a coordinate branch of government," for no such decision has been made. Indeed, no official occasion for such a decision will arise; if the decision is to be made at all, it will be by the federal courts. Thus the case will not create embarrassment from multifarious pronouncements by various departments on one question.

Finally, judicial resolution of the issues presented here will not express lack of the respect due the coordinate branches of government. Even where, unlike here, the President and the Congress have made specific

a rifle across Connecticut River and murdered a man in Vermont, he must

legal determinations in the course of their duties, the courts have not hesitated to differ with them. Thus, in Powell v. McCormack, supra, at 549, the Court declared:

> "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility."

And in National Treasury Union Employees v. Nixon, supra, slip opinion at 34, the court noted that its "failure . . . to take jurisdiction over the issue" because of a clash with the President "might be constitutionally improper," and quoted Chief Justice Marshall:

> "It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."

Cohens v. Virginia, 19 U.S. 264, 404 (1821)

Finally, as the National Treasury court concluded in deciding a civil suit brought against the President:

> "In this case, simple justice requires a sensible speedy remedy, and '[j]ustice,' as was written nearly two hundred years ago in The Federalist, Number 51, 'is the end of government. It is the end of civil society. It ever has been and ever will be preserved until it be obtained, or until liberty be lost in the pursuit.' Such truths are immutable -- they live -- they govern us -- and they compel our course of action in a case such as this." Slip opinion at 54-55.

IV. JURISDICTION VIS-A-VIS THE PRESIDENT

The claim that the President is immune from court process and the jurisdiction of the court is unequivically quashed in Nixon v. Sirica, 487 F. 2d 700 (1973). To avoid diluting the force of what the court had to say, the pertinent Section III (B) of Nixon v. Sirica, supra, at 708-712, is presented here in its entirety.

III.

We turn, then, to the merits of the President's petition. Counsel for the President contend on two grounds that Judge Sirica lacked jurisdiction to order submission of the tapes for inspection. Counsel argue, first, that, so long as he remains in office, the President is absolutely immune from the compulsory process of a court; and, second, that Executive privilege is absolute with respect to presidential communications, so that disclosure is at the sole discretion of the President. This immunity and this absolute privilege are said to arise from the doctrine of separation of powers and by implication from the Constitution itself. It is conceded that neither the immunity nor the privilege is express in the Constitution.

A.

[10] It is clear that the want of physical power to enforce its judgments does not prevent a court from deciding an otherwise justiciable case.[32] Nevertheless, if it is true that the President is legally immune from court process, this case is at an end. The judiciary will not, indeed cannot, indulge in rendering an opinion to which the President has no legal duty to conform. We must, therefore, determine whether the President is *legally* bound to comply with an order enforcing a subpoena.[33]

We note first that courts have assumed that they have the power to enter mandatory orders to Executive officials to compel production of evidence.[34]

26. *Supra* note 18.

27. *Supra* note 18, 379 U.S. at 110, 85 S.Ct. 234.

28. *Id.* at 111, 85 S.Ct. at 239.

29. *Id.*

30. *See* Ex parte Republic of Peru, 318 U.S. 578, 584, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

31. *See, e. g.*, Ex parte Skinner & Eddy Corp., 265 U.S. 86, 95–96, 44 S.Ct. 446, 68 L.Ed. 912 (1924).

32. Glidden v. Zdanok, 370 U.S. 530, 568–571, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); Baker v. Carr, 369 U.S. 186, 208–237, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). *See also* South Dakota v. North Carolina, 192 U.S. 286, 318–321, 24 S.Ct. 269, 48 L.Ed. 448 (1904); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 461–462, 20 S.Ct. 168, 44 L.Ed. 223 (1898).

33. If the judiciary's want of *de facto* power to enforce its judgment has any relevance, it is that the third branch of government, posing little physical threat to coordinate branches, need not hesitate to reject sweeping claims to *legal* immunity by those coordinate branches. *See* United States v. Lee, 106 U.S. (16 Otto) 196, 223, 1 S.Ct. 240, 27 L.Ed. 171 (1882).

34. *See, e. g.*, United States ex rel. Touhy v. Ragen, 340 U.S. 462, 465–466, 472, 71 S.Ct. 416, 95 L.Ed. 417 (1951) (Frankfurter, J., concurring); Westinghouse Electric Corp. v. City of Burlington, Vermont, 122 U.S.App.D.C. 65, 351 F.2d 762 (1965); Boeing Airplane Co. v. Coggeshall, 108 U.S.App.D.C. 106, 280 F.2d 654 (1960).

While a claim of an absolute Executive immunity may not have been raised directly before these courts, there is no indication that they entertained any doubts of their power. Only last term in Environmental Protection Agency v. Mink,[35] the Supreme Court stated that a District Court "may order" *in camera* inspections of certain materials to determine whether they must be disclosed to the public pursuant to the Freedom of Information Act.[36]

The courts' assumption of legal power to compel production of evidence within the possession of the Executive surely stands on firm footing. Youngstown Sheet & Tube Co. v. Sawyer,[37] in which an injunction running against the Secretary of Commerce was affirmed, is only the most celebrated instance of the issuance of compulsory process against Executive officials. *See, e. g.*, United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (affirming an order requiring the Government to make full disclosure of illegally wiretapped conversations); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1828) (issuing a mandamus to Postmaster General, commanding him fully to comply with an act of Congress); State Highway Commission v. Volpe, 479 F.2d 1099 (8th Cir. 1973) (enjoining the Secretary of Transportation).

[11] It is true that, because the President has taken personal custody of the tapes and is thus himself a party to the present action, these cases can be formally distinguished. As Judge Sirica noted, however, to rule that this case turns on such a distinction would be to exalt the form of *Youngstown Sheet & Tube* over its substance, Justice Black, writing for the *Youngstown* majority, made it clear that the Court understood its affirmance effectively to restrain the President. There is not the slightest hint in any of the *Youngstown* opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party.[38] If *Youngstown* still stands, it must stand for the case where the President has himself taken possession and control of the property unconstitutionally seized, and the injunction would be framed accordingly. The practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own. This is not to say that the President should lightly be named as a party defendant. As a matter of comity, courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President. Here, unfortunately, the court's order must run directly to the President, because he has taken the unusual step of assuming personal custody of the Government property sought by the subpoena.

[12-14] The President also attempts to distinguish United States v. Burr,[39] in which Chief Justice Marshall squarely ruled that a subpoena may be directed to the President. It is true that *Burr* recognized a distinction between the issuance of a subpoena and the ordering of compliance with that subpoena, but the distinction did not concern judicial power or jurisdiction. A subpoena *duces tecum* is an order to produce documents or to show cause why they need not be

35. 410 U.S. 73, 93, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

36. *See* text at notes 92-97 *infra*.

37. 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

38. In Land v. Dollar, 89 U.S.App.D.C. 38, 190 F.2d 623 (1951), vacated as moot, 344 U.S. 806, 73 S.Ct. 7, 97 L.Ed. 628 (1952), as well, it was clear that the court realized that its order countered the executive will of the President. The *Land* court acknowledged that the President had directed the cabinet officials to disregard the initial judicial decision. *Id.* at 54, 190 F.2d at 639.

39. 25 Fed.Cas. p. 30 (Case No. 14,692d) (1807).

produced. An order to comply does not make the subpoena more compulsory; it simply maintains its original force. The Chief Justice's words merit close attention. His statement:

> Whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it[,]

is immediately followed by the statement:

> The guard, furnished to this high officer, to protect him from being harassed by *vexatious and unnecessary* subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued.[40]

The clear implication is that the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance. This implication is borne out by a later opinion by the great Chief Justice in the same case. When President Jefferson did not fully respond to the subpoena issued to him, Colonel Burr inquired why the President should not comply. The Chief Justice's answer should put to rest any argument that he felt the President absolutely immune from orders of compliance:

> The president, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives *may be* such as to restrain the court from enforcing its production. * * * I can readily conceive that the president might receive a letter which it would be improper to exhibit in public * * *. The occasion for *demanding* it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be *insisted* on. * * * Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on *light ground* to be forced into public view.[41]

A compliance order was, for Marshall, distinct from an order to show cause simply because compliance was not to be ordered before weighing the President's particular reasons for wishing the subpoenaed documents to remain secret. The court was to show respect for the President in weighing those reasons, but the ultimate decision remained with the court.[42]

Thus, to find the President immune from judicial process, we must read out of *Burr* and *Youngstown* the underlying principles that the eminent jurists in

40. *Id.* at 34. (Emphasis supplied.)

41. United States v. Burr, 25 Fed.Cas. pp. 187, 190, 191-192 (Case No. 14,694) (1807). (Emphases supplied.)

42. In 1818, several years after the *Burr* case, a subpoena was also issued to President James Monroe. It summoned the President to appear as a defense witness in the court martial of Dr. William Burton, naming a specific date and time. A copy of the summons is in Attorney General's Papers: Letters received from State Department, Record Group 60, National Archives Building. Attorney General Wirt advised Monroe, through Secretary of State John Quincy Adams, that a subpoena could "properly be awarded to the President of the United States," but suggested that the President indicate on the return that his official duties precluded a personal appearance at the court martial. William Wirt to John Quincy Adams, Jan 13, 1818, Records of the Office of the Judge Advocate General (Navy), Record Group 125, (Records of General Courts Martial and Courts of Inquiry, Microcopy M-272, case 282), National Archives Building. In conformance with this advice, Monroe wrote on the back of the summons that he would "be ready and willing to communicate, in the form of a deposition any information I may possess, relating to the subject matter in question." President James Monroe to George M. Dallas, Jan. 21, 1818, *id.* Subsequently, President Monroe did in fact submit answers to the interrogatories forwarded to him by the court. President James Monroe to George M. Dallas, Feb. 14, 1818, *id.*

each case thought they were establishing. The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight. James Madison raised the question of Executive privileges during the Constitutional Convention,[43] and Senators and Representatives enjoy an express, if limited, immunity from arrest, and an express privilege from inquiry concerning "Speech and Debate" on the floors of Congress.[44] Lacking textual support, counsel for the President nonetheless would have us infer immunity from the President's political mandate, or from his vulnerability to impeachment, or from his broad discretionary powers. These are invitations to refashion the Constitution, and we reject them.

[15] Though the President is elected by nationwide ballot, and is often said to represent all the people,[45] he does not embody the nation's sovereignty.[46] He is not above the law's commands: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law . . . ."[47] Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.

[16] Nor does the Impeachment Clause imply immunity from routine court process.[48] While the President argues that the Clause means that impeachability precludes criminal prosecution of an incumbent, we see no need to explore this question except to note its irrelevance to the case before us. The order entered below, and approved here in modified form, is not a form of criminal process. Nor does it compete with the impeachment device by working a constructive removal of the President from office. The subpoena names in the alternate "any subordinate officer," and the tasks of compliance may obviously be delegated in whole or in part so as not to interfere with the President's official responsibilities.[49] By contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency does not relieve the President of the routine legal obligations that confine all citizens. That the Impeachment Clause may qualify the court's power to sanction non-compliance with judicial orders is immaterial. Whatever the qualifications, they were equally present in *Youngstown*: Commerce Secretary Sawyer, the defendant there, was an impeachable "civil officer,"[50] but the injunction against him was nonetheless affirmed. The legality of judicial orders should not be

43. II Farrand, The Records of the Federal Convention of 1787, 502–503 (1967).

44. U.S.Const., art. I, § 6, ¶ 1.

45. Myers v. United States, 272 U.S. 52, 123, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

46. *See, e. g.*, United States v. Burr, *supra* note 39, 25 Fed.Cas. at 34.

47. Youngstown Sheet & Tube Co. v. Sawyer, *supra* note 37, 343 U.S. at 655, 72 S.Ct. at 880 (1952) (Jackson, J., concurring).

48. U.S.Const., art. I, § 3, ¶ 7:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

49. On this point, too, Chief Justice Marshall was instructive:

> If, upon any principle, the president could be construed to stand exempt from the general provisions of the constitution, it would be, because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting.

United States v. Burr, *supra* note 39, 25 Fed. Cas. at 34.

50. Because impeachment is available against all "civil Officers of the United States," not merely against the President, U.S.Const. art. II, § 4, it is difficult to understand how any immunities peculiar to the President can emanate by implication from the fact of impeachability.

confused with the legal consequences of their breach; for the courts in this country always assume that their orders will be obeyed, especially when addressed to responsible government officials. Indeed, the President has, in this case, expressly abjured the course of setting himself above the law.

Finally, the President reminds us that the landmark decisions recognizing judicial power to mandamus Executive compliance with "ministerial" duties also acknowledged that the Executive Branch enjoys an unreviewable discretion in many areas of "political" or "executive" administration.[51] While true, this is irrelevant to the issue of presidential immunity from judicial process. The discretionary-ministerial distinction concerns the nature of the act or omission under review, not the official title of the defendant.[52] No case holds that an act is discretionary merely because the President is the actor.[53] If the Constitution or the laws of evidence confer upon the President the absolute discretion to withhold material subpoenaed by a grand jury, then of course we would vacate, rather than approve with modification, the order entered below. However, this would be because the order touched upon matters within the President's sole discretion, not because the President is immune from process generally. We thus turn to an examination of the President's claim of an absolute discretion to withhold evidence from a grand jury.

B.

[17-19] There is, as the Supreme Court has said, a "longstanding principle" that the grand jury "has a right to every man's evidence" except that "protected by a constitutional, common law, or statutory privilege." [54] The Presi-

51. *See, e. g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165, 2 L.Ed. 60 (1803); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 610, 9 L.Ed. 1181 (1838).

52. [T]he question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.
Marbury v. Madison, *supra* note 51, 5 U.S. (1 Cranch) at 165.

The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of any executive character; but to enforce the performance of a mere ministerial act, which neither he *nor the President* had any authority to deny or control.
Kendall v. United States ex rel. Stokes, *supra* note 51, 37 U.S. (12 Pet.) at 610. (Emphasis supplied.)

53. In this regard, the President's reliance on Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1866), is misplaced. In that case, the State of Mississippi sought to enjoin President Johnson from enforcing the Reconstruction Acts. Though Attorney General Stanbery argued that the President was immune from judicial process, the Court declined to found its decision on this ground, choosing instead to deny the bill of injunction as an attempt to coerce a discretionary, as opposed to ministerial, act of the Executive. The Attorney General rehearsed many of the arguments made by the President in this case, claiming that the President's dignity as Chief of State placed him above the reach of routine judicial process and that the President was subject only to that law which might be fashioned in a court of impeachment. *Id.* at 484. We deem it significant that the Supreme Court declined to ratify these views. *Compare* Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 18 L.Ed. 721 (1867), where the Court declined jurisdiction of a similar bill of injunction even though sub-presidential Executive Branch officials were named as defendants.

54. Branzburg v. Hayes, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972). We reject the contention, pressed by counsel for the President, that the Executive's prosecutorial discretion implies an unreviewable power to withhold evidence relevant to a grand jury's criminal investigation. The federal grand jury is a constitutional fixture in its own right, legally independent of the Executive. *See* United States v. Johnson, 319 U.S. 503, 510, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943). A grand jury may, with the aid of judicial process, Brown v. United States, 359 U.S. 41, 49-50, 79 S.Ct. 539, 3 L.Ed.2d 609 (1959), call witnesses and demand evidence without the Executive's impetus. Hale v. Henkel, 201 U.S. 43, 60-65, 26 S.Ct. 370, 50 L.Ed. 652 (1906). If the grand jury were a legal appendage of the Executive, it could hardly serve its historic functions as a shield for the innocent and a sword against corruption in high places. In his eloquent affirma-

V. STANDING

From the very beginning the Supreme Court has acknowledged that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison,1 Cranch 137, 163 (1803). In the reapportionment suits of the '60s it was squarely held "that voters who allege facts showing disadvantage to themselves as individuals have standing to sue." Baker v. Carr, supra, 369 U.S. at 206. The Baker Court futher stated:

> "It would not be necessary to decide whether appellants' allegations of impairment of their votes...will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," not merely a claim of "the right, possessed by every citizen, to require that the government be administered according to law...." Id. at 208; quoting Coleman v. Miller, 307 U.S. at 438, and Fairchild v. Hughes,258 U.S. 126,129, respectively; compare Leser v. Garnett, 258 U.S. 130.

Ex parte Levitt,302 U.S. 633, 634 (1937) indicates that "to envoke the judicial power to determine the validity of executive action" plaintiff must show more than "a general interest common to all members of the public." Since plaintiffs in the instant suit allege innumerable actions that were neither "executive or legislative action," this is incontrovertibly a faulty precedent for defence; nevertheless, to pre-empt any such argument, the question of "general interest" will be dealt with here.

Plaintiffs clearly "allege facts showing disadvantage to themselves" and an interest not "common to all members of the public" when (e.g.) the instant complaint defines the plaintiff class as all those "who suffered disadvantage to themselves" (par.5) and stated that the defendants skewed "the election to the advantage of those who approved of all that Nixon and his Administration did and stood for, and to the disadvantage of those who were or would have been in opposition -- effectively debasing, devaluing,

and diminishing their vote," (par.168) and that "the valve of the vote was effectively debased for the millions of voters to whom a more acceptable candidate had been denied by the unlawful manipulations of the defendants and their agents," (par.169) and futher states that:

> "Through corruption, fraud, and even violence...through determinative Informational Irregularities that produced "Mislabeling" of candidates and manipulations of party nominations, the defendants and their agents did cause to be deprived, did conspire to deprive, and did deprive plaintiffs - i.e., all registered voters who were in opposition to President Nixon and his Administration or would have been if the truth, vis-a-vis Nixon, had not been unlawfully kept from them and/or if the more acceptable candidates had not been unlawfully manipulated out of the Democratic ...party nomination - of their right to "Free Elections"...of their right to a full-valued vote, of their right to know, of their right to equal protection of the law, and of their right to due process." (par.170)

with the alleged facts - the Informational Irregularities - consuming pages 7 through 42 of the complaint.

Pages 5 et seq of the memorandum clearly demonstrate that there exists a judicially recognized injury in the instant action.

VI. COMMENTS ON U.S. ATTORNEY COOK"S MEMORANDUM

Watergate morality has at last reached its long powerful arm into Vermont, forcing our U.S. Attorney's Office to "stonewall" for President Nixon...to file a memorandum (and motion) for dismissal so flimsy and substanceless that its intent could only be to stall for time.

A. JURISDICTION VIS-A-VIS THE PRESIDENT

(See pages 28 et seq for jurisdiction argument.)

A reading of Nixon v. Sirica, supra (page 29 et seq of mem.) smashes any contention that Richard Nixon is immune from the process of the Court.

The U.S. Attorney's memorandum, holding tightly to the theory that the President can never-never-never be named in a suit, proceeds to

misapply precedents in there argument, for the cases cited were concerned with the question of whether or not an act of the executive was discretionary or ministerial - i.e., whether or not it was a political question - and the cited cases did not attempt to resolve the question of whether or not a President is immune from judicial process.

In Nixon v. Sirica, supra, at 712, n.53, the Court, in commenting on Nixon's reliance upon Mississippi v. Johnson, 71 U.S. (4 Wall) 475, said:

> "[T]he President's reliance on Mississippi v. Johnson is misplaced. In that case, the State of Mississippi sought to enjoin President Johnson from inforcing the Reconstruction Act. Though Attorney General Stanbery argued that the President was immune from judicial process, the Court declined to found its decision on this ground, choosing instead to deny the bill of injunction as an attempt to coerce a discretionary, as opposed to ministerial, act of the Executive. The Attorney General rehearsed many of the arguments made by the President in this case, claiming that the President's dignity as Chief of State placed him above the reach of routine judicial process and that the President was subject only to that law which might be fashioned in a Court of impeachment. We deem it significant that the Supreme Court declined to ratify these views.

The findings in Marbury v. Madison, supra, were the reverse of what memorandum implies. The Marbury Court found that the executive was not immune to judicial process in the case before them because there was no intrution upon executive discretion. The suasion of the Marbury Court is easily discernible in:

> "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." Id. at 147; quoting 3 Bl. Com. 109.

> "The government of the United States has been empathically termed a government of laws, and not of men. It certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Id. at 163

> "[T]he question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act." Id. at 165.

The 100 word decision of San Francisco Redevelopment Agency v. President M. Nixon,329 F. Supp. 672 (N.D. Calif. 1971), merely reafirms the long standing policy of suits against the Federal government having executive

officers, instead of the President, stand as defendants. The remaining precedents are also unquestionably distinguishable from and inapplicable to the instant action.

B. STANDING (See pages 34 et seq for standing argument.)

The memorandum's use of Ex parte Levitt, supra, at 634 is erroneous because many of the alleged actions are non governmental, others were not discretionary "executive or legislative" acts, and others criminal.

The memorandum claims that "plaintiff has alleged no injury to himself distinguishable from that of any other citizen." This is clearly false as pages 34 et seq of plaintiffs memorandum and the complaint in its entirety squarely indicate. In the precedents cited, the complainants either did not claim a differentiable injury or were questioning an "executive or legislative action" while disclosing no interest other than that of all members of the public - making the instant case clearly distinguishable.

The evocation of Sloan v. Nixon, 60 F.R.D. 228 - an irresponsible frivolous suit of 4 1/2 pages (complaint) that did not allege a disadvantage to plaintiff vis-a-vis other citizens and asked not only for the dismissal of the President and Vice President, but also of 4 Supreme Court Justices (Wild!) - is clearly spurious.

From this pervasive disregard of the exigencies of matching argument (precedent) to complaint, plaintiffs can only speculate that the cited precedents are no more than stones with which to "stonewall" this action.

C. POLITICAL QUESTION (See pages 22 et seq for pol. question.)

Plaintiffs cited the same paragraph from Baker v.Carr, supra at 217 (p.23 of plaintiffs memorandum) and then took this shopping list of ways to be a Political Question and demonstrated, point-by-point, that the instant action fails to meet any of the criteria. The U.S.Attorney's memorandum makes

no claim that any of the criteria are met.

Konigsberg v. Nixon, No. 73-2455, 9th Cir. (March 11, 1974), a flimsy, fatuous suit that asked the Court to void the '72 Presidential election because President Nixon "informed the Public that peace was at hand for the purpose of assuring his re-election," a suit that was uncontestably a political question, is clearly distinguishable from the instant suit for the acts cited by plaintiffs were either not governmental or not lawful, discretionary act of the executive...with many of the individual acts having already been the cause of indictments and convictions thereby displaying their justiciability.

D. AMICUS CURIAE

Plaintiffs ask the court to deny any request for the U.S.A. to appear as amicus curiae subsequent to the dismissal of the attacks upon Courts jurisdiction as to the President.

VII. COMMENTS ON RYAN, SMITH & CARBINE'S MEMORANDUM

A. STANDING & POLITICAL QUESTION

Memorandum's sections I & II on Standing and Justiciability were taken directly from the U.S. Attorney's memorandum (section III & IV).

B. SERVICE OF PROCESS

Plaintiffs were greatly mystified as to why the Court had granted defendants, Committee for the Re-election of the President (hereinafter CREEP) and Finance Committee to Re-elect the President (hereinafter F-CREEP), through their attorneys Ryan,Smith&Carbine (RS&C) permission to submit a reply to the instant complaint over a month after they had defaulted. Now plaintiffs must surmise that RS&C told the Court, as they do in the memorandum, that plaintiffs did not serve either of the two above defendants, but

rather made substitute service upon U.S. Attorney Cook as statutory agent for the defendants. This is patently false: summons and complaints were given to the U.S. Marshall's Office (via the Clerk's Office) to be served upon CREEP and F-CREEP at 1701 Pennsylvania Ave. NW, Washington D.C., and subsequent to RS&C's memorandum, plaintiff Charles Bradley Griffith telephoned the U.S. Marshall's Office to check service and was told, after they checked their records, that service had been made at the above address.

RS&C's ignorance of the foregoing (if not contrived) not only manifests negligence, but also brings into question who RS&C really represents. Did the Presidents lawyers and/or the Justice Department and/or the U.S. Attorney in Vermont, upon discovering that CREEP and F-CREEP had given no reply (possibly depending upon the President's reply), countermand that decision... securing the engagement of a Vermont law firm (RS&C - whose contact, if any, with CREEP and F-CREEP has been so minimal that they did not even know that their clients had received summons and complaints at said D.C. address) to enter a belated reply -- thereby more effectively impeding the proceedings.

To plaintiffs' knowledge, there has been presented to the Court no explanation for defendants' default - except that which was patently false. Therefore defendants', CREEP and F-CREEP, right to reply should be recanted and voided.

C. VENUE

As their memorandum admits, the residents of an unincorporated association has, for venue purposes, been expanded by the Second Circuit to include "all the judicial districts in which the unincorporated entity is doing business." Rutland Railway Corporation v. Brotherhood of Locomotive Engineers, 307 Fd 21 (2nd Cir. 1962) To contend that this test is not met is inane and disingenuous, for it is inherent and implicit that CREEP and F-CREEP were "doing business" in Vermont and in all the other states. President

Nixon was their product and all 50 states and the District of Columbia was their market -- all the selling of the President that necessarily occurred in Vermont (both internally and externally initiated) was directly or indirectly the responsibility of CREEP and F-CREEP.

U.S. v. Brandom (D.C. Mo. 1970) 320 F. Sup. 520, makes no reference to venue contrary to what RS&C's memorandum claims.

D. JURISDICTION (Section IV)

The memorandum's claim that the Court lacks jurisdiction over the defendant committees because of the absence of "contact or activity" or "any act or conduct within the state" is redundant in view of the venue discussion. When an organization runs a candidate in a state (as defendant committees were in Vermont), by the very nature of things, they will seek and receive contributions, distribute and receive money, send literature etc., run ads on TV etc., send and engage speakers, exchange information, advise, co-ordinate, and a myriad of other things that a campaign does to aid and generate support in a state.

E. JURISDICTION (Section V)

RS&C acknowledged the superfluousness of this attack by giving this section the same number (V) as the previous section. They ask that "all claims based on diversity of citizenship" be dismissed: since there are none it is a waste of plaintiffs, defendants, and the Courts time to argue this moot point.

Plaintiffs would, however, like to note that - besides the clearly distinguishable overt acts such as the spending in Vermont illegally acquired funds (which were indistinguishable from and intermingled with legitimate funds) - all "Informational Irregularities" were overt acts upon plaintiffs living in Vermont for: if a man stood in New Hampshire and shot

a rifle across Connecticut River and murdered a man in Vermont, he most certainly committed an overt act in Vermont; likewise, if fraudulently manipulated information is directed into Vermont skewing the election, an overt act has most certainly been committed there.

RS&C's myopic attack upon venue and jurisdiction are clearly mere attempts at delay, for there would be no advantage for defendants to have the suit filed elsewhere (e.g., New Hampshire which qualifies even for those who wear blinders) except for their escape from the integrity of the Vermont Court and DELAY...DELAY...DELAY.

CONCLUSION

The memorandums of U.S. Attorney Cook RS&C, presenting their (defendants) best arguments in support of motions, were squarely without persuasion or substance, unabashedly evoking misapplied, spurious,and frivalous precedents. With the merit of their motions being fully manifested by the quality of their memorandums,plaintiffs ask the Court to dismiss all attacks upon standing, jurisdiction, justiciability, venue, and service .

Plaintiffs also asks the Court to expedite this election dispute - that justice may be done.

Dated at Burlington, Vermont this 9th day of July,1974.

CHARLES BRADLEY GRIFFITH

- pro se -

Att: Appellant was served on the 19 of March according to Appellee's Certificate of Service. 14 days plus 3 days for mail service makes Saterday, April 5 the due date of Reply Brief...and thereby Monday, April 7... i.e. mailed by Monday.

CERTIFICATE OF SERVICE

I, Charles Bradley Griffith, plaintiff pro se, do swear & certify that I served the foregoing REPLY BRIEF & ADDENDUM TO APPENDIX .....upon the United States of America (and Richard M. Nixon) by mailing a copy of same to Jerome F. O'Neill, Esquire, Assistant U.S. Attorney, Post Office Building., Rutland, Vermont 05701 and upon the Finance Committee to Re-elect the President and the Committee for the Re-election of the President by mailing a copy to their Attorneys, Ryan, Smith & Carbine, the Mead Building, Rutland, Vermont 05701.

April 7, 1975

Charles Bradley Griffith
- pro se -
Box 291, Putney, Vermont

Please file understanding
diversion to the Clerk

Thank you